

Chapter 5: Protection against violence and harassment

women and family law
10th edition



WOMEN'S LEGAL SERVICES NSW



5 Protection against violence and harassment

5.1 Domestic violence

What is domestic violence?

Domestic violence occurs when one person tries to coerce or control another person in a family-like or **domestic relationship**. See Chapter 8 for definition of domestic relationship.

Domestic violence involves an abuse of power and can take the form of physical violence, sexual abuse, emotional or psychological abuse, verbal abuse, **stalking** and intimidation, social and geographic isolation, financial abuse, cruelty to pets, or damage to **property** or threats to be violent in these ways. In the majority of cases, domestic violence is perpetrated by men against women. However, women can be perpetrators of violence in both heterosexual and same sex relationships.

What is the difference between domestic violence and family violence?

The terms 'domestic violence' and '**family violence**' are often interchanged. They both generally refer to violence between two or more people who are connected by a domestic relationship.

In NSW, the terms 'domestic violence' and violence in a 'domestic relationship' are used in the *Crimes (Domestic and Personal Violence) Act 2007 (Domestic Violence Act)*. This legislation deals with personal protection orders called Apprehended Violence Orders (**AVOs**). However, the federal *Family Law Act 1975 (Family Law Act)* refers to 'family violence'. This definition of family violence changed in 2012 and acknowledges more types of abuse. See Chapter 8 for the definition of 'domestic relationship' and 'family violence'.

The laws about domestic violence protection orders are different in each state or territory.

Is domestic violence a crime?

Domestic violence is a crime and should be reported to the police.

The police may charge the violent person with assault and/or apply for an **Apprehended Domestic Violence Order (ADVO)** for

your protection. Many police stations also have **Domestic Violence Liaison Officers (DVLOs)** who should be helpful and understanding if you report domestic violence. If police come to your home as a result of violence, they can get a temporary ADVO quickly by email to protect you until you can go to court. This type of ADVO is called a **Provisional Order**.

If the victim would like to remain in the house with the children, Police have the power to exclude the violent person from the house.

Police should also remove any firearms from the violent person. If the violent person is on bail for assault or some other crime, you can ask that the person be ordered to report to a police station further away from where you and the children live.

Where do I go if I need to leave my house?

If you need to leave your home in order to be safe from violence, there are organisations that can support you. Women's refuges provide a safe place to stay and some time to work out future plans. Counselling services can help you emotionally and give you a chance to talk over your options. They can also give you referrals for financial help. The Domestic Violence Line can also provide information and referrals to women's refuges in your area. See Chapter 9: Referrals and Resources for details.

5.2 Apprehended Domestic Violence Orders

What is an ADVO and how can it protect me?

An ADVO is a court order that places restrictions on the person who is violent or abusive towards you. In ADVO matters, this person is referred to as the **defendant**. An ADVO can be tailored to your own circumstances so it provides the best possible protection. An ADVO cannot order a person to do something, for example attend counselling or an anger management course.

What is the difference between a domestic violence and personal violence order?

You apply for an **Apprehended Domestic Violence Order (ADVO)** if you are involved or were previously involved in a domestic relationship with that person.

You apply for an **Apprehended Personal Violence Order (APVO)** if you are not related to or have never been in a domestic relationship

with the person, for example, you are neighbours or co-workers.

The information in this booklet is about ADVOs.

Is it a criminal offence if an ADVO is made against me or someone else?

The purpose of an ADVO is to protect you from the future behaviour of the violent person. Having an ADVO against you is not a criminal offence and is not listed on the defendant's criminal record.

If the defendant breaches (disobeys) the ADVO issued against them it can lead to a criminal offence, because it is a breach of a court order. If a breach occurs, the police will investigate the incident and where there is sufficient evidence, charge the violent person. If that person is found guilty of the charge, a criminal conviction can be recorded.

If I have an ADVO, does it mean my partner has to leave the house?

An ADVO does not automatically mean that the defendant has to leave your home. You can still be in a relationship and have an ADVO that orders your partner not to assault, molest, threaten, harass, intimidate or stalk you, and other orders to suit your circumstances.

How do I get an ADVO?

You can report the violence to the police who can then make an application on your behalf, or you can make a private **application** for an ADVO at your **Local Court**.

If you make a private application, the **Registrar** at the Local Court can prepare the ADVO application for you. You must explain to the Registrar the reasons why you want an ADVO. You should also tell the Registrar what has happened recently and in the past and why you are fearful. You need to know the address of the violent person. The Registrar will prepare the application, which will be **served on** the violent person and order them to come to court.

What if I need immediate protection?

If you are asking the police to apply for an ADVO for your protection, the police can apply for a **provisional** or **interim** ADVO for your protection. The police will apply for a provisional ADVO when they believe that someone needs immediate protection. A

provisional ADVO lasts for 28 days. It will expire at midnight on the 28th day, or sooner if the application is revoked, withdrawn or dismissed, including if it becomes an interim or final ADVO. The provisional ADVO will not be enforceable until it is served on (formally given to) the defendant by the police.

If you are making a private application for an ADVO, you can ask the Registrar to apply for an interim ADVO.

An interim ADVO application can be considered by the Court even if the defendant is not in Court or aware of the application. However, it will not be enforceable until it is served on (formally given to) the defendant by the police. The interim ADVO will last until the case next comes to court where it can be extended, varied or made into a final order.

Will a lawyer help me at court?

If the police made the application on your behalf, the police prosecutor will represent you in court. You will not need to organise your own lawyer. You will still need to go to court to support the police application for an ADVO for your protection.

If you made the application privately with the help of the Registrar, you can represent yourself or have a lawyer represent you. Legal aid is available in some cases to people who meet the legal aid means test and availability of funds test. There may be a duty solicitor to represent you for free as part of the **Women's Domestic Violence Court Advocacy Services (WDVCAS)**.

What support can I get at court?

Many Local Courts have a **WDVCAS** where you can get help from a court support worker. At a number of courthouses, there are 'safe rooms'. These are women only rooms where you can speak to a court support worker and/or lawyer. Call your Local Court to find out whether it has a WDVCAS and a free lawyer. If not, you should tell the court staff about your safety fears so the Court can make arrangements to protect you from threats of violence and intimidation. See Chapter 9: Referrals and Resources for more details.

What happens on the first day the application for an ADVO is at court?

On the first day the application for an ADVO comes to court, there are a few possible outcomes:

- The violent person may come to court and agree to the orders in your application. If this happens, an ADVO can be finalised immediately. The violent person can consent to an ADVO without admitting what is in the application is true. This is called 'consenting without admission.'
- If the violent person does not attend court but there is proof that he or she has been served with (received) the application to come to court, the Magistrate can order an ADVO in his or her absence. This is called an *ex parte* ADVO. The Magistrate can also make an interim ADVO if the violent person has not been served with the application. An *ex parte* or interim ADVO is not enforceable until it is served on the defendant.
- If the violent person has not been served and did not attend Court, the matter will be **adjourned** (postponed) to a later date so the violent person can be informed. The ADVO is not enforceable until the order is formally served on (given to) the violent person. The Court can make an interim ADVO for your protection which will be enforceable as soon as it is served on the violent person.
- If the violent person comes to court but disagrees with the application for an ADVO, the Court will tell the parties to come back on a later date for a hearing. The Court can make an interim ADVO for your protection which will protect you until the hearing. The violent person can agree to this interim order without admitting to any of the violent behaviour. If the violent person does not agree to an interim order for your protection, you may need to tell the Magistrate why you need the order. The Magistrate will then decide if you need an interim ADVO for your protection. The Magistrate will also make a date to exchange statements before the hearing date. If you are the defendant or if you are applying privately for your ADVO, you should get legal advice about drafting your statement. The WDVCS can help refer you for advice. See above: What support can I get at court? and Chapter 9: Referrals and Resources.

What happens if my ADVO application goes to a hearing?

At the hearing, the Magistrate will listen to the evidence you give about the violence and/or threats of violence that make you afraid. The Magistrate will also hear the defendant's version of events and then decide on 'the balance of probabilities' whether or not you fear the defendant and if these fears are reasonable. If the Magistrate agrees with your fears, an ADVO will be ordered for your protection.

What orders can be made?

Every ADVO will say the defendant must not:

- assault, molest, threaten, harass;
- intimidate; or
- stalk,

you or anyone in a domestic relationship with you.

These orders are called mandatory orders.

In addition to these mandatory orders the Magistrate can make orders depending on your circumstances. For example, these could be that the defendant must not:

- go to your home or workplace; and/or
- approach you (by telephone, sms, email, social media or in person); and/or
- live at your place; and /or
- keep any firearms.

When an ADVO is made the Magistrate can also make an order for you or the defendant to collect personal property. This is called an *ancillary property recovery order*. It can order that the police or another person must also go with the person collecting the property.

The orders in an ADVO stay in place for the time period set by the Court. ADVOS are usually made for one or two years but could be for more or less time.

What happens after the ADVO is made?

You will be given a copy of the order or interim order by the court staff or a copy will be mailed to you, and the police will keep a copy of it on their central computer. You should keep a copy of the order

with you at all times. This will make it easier to tell the police about the ADVO if the order is breached.

The ADVO is not enforceable unless the defendant was in court when the order was made or the police served the order on them. If the defendant disobeys the order, the police can arrest and charge the person with breaching the order. If you think the defendant has breached the order, you should report it to the police.

Important Information

If the violent person breaches the ADVO there are a number of things that you can do:

- *Keep a record of all breaches of the ADVO, no matter how small they may seem to you. This may help to establish a pattern of abusive behaviour over a period of time. Every time the violent person breaches the ADVO write details about:*
 - *the date and time of the incident;*
 - *what happened – what did the violent person do or say, how did you respond;*
 - *any witnesses who saw or heard what happened; and*
 - *what you did afterwards.*
- *Ask any witnesses to keep a record of the incident and write down what they saw or heard.*
- *Collect evidence of the breach:*
 - *A message from the violent person may be a breach of the ADVO. Save any emails, text messages, messages on social media, voicemail messages or messages on your answering machine. You can then show or play these messages to the police;*
 - *If you are physically injured, go to the doctor or hospital for medical care;*
 - *Take photographs of any injuries (e.g. bruises or scratches).*
- *Report the breach to the police. You can telephone the police or go in person to the police station to make a statement. Use the notes you made to help you make a statement to the police. You should report all breaches of the ADVO to police no matter how small or insignificant they seem to you. By consistently making the reports, you can establish a pattern of abusive behaviour over a period of time.*

- *Keep a record of any reports you make to police. Write down:*
 - *the date(s) you made the report to the police;*
 - *how you made the report (by telephone or in person);*
 - *the name of the police station where you made the report;*
 - *the name of the police officer you spoke to; and*
 - *the police event number. This is a special number that records the incident on the police computer system.*

What if I am still afraid when the ADVO period is up?

If you still fear violence when the order is about to expire, you can apply for an extension of the ADVO. You must apply for an extension of the order before it expires. You should get legal advice about an extension 6-8 weeks before the ADVO expires.

If things change during the period of the ADVO, you can apply to the Court to have the order varied.

If the order has expired and you still have fears you can apply for a new ADVO.

Can my children and new partner be protected too?

The mandatory orders in an ADVO protect you and any person with whom you have a domestic relationship (such as children and a new partner).

You can also ask that your new partner be named separately as a protected person on your ADVO so that they are protected by any other orders on the ADVO.

If the Court issues an ADVO for your protection, the orders should include any child with whom you have a 'domestic relationship' (unless the Court thinks there are good reasons for not doing this).

Only the police can make an application for an ADVO for children aged under 16.

5.3 ADVOs and family law

What if my ADVO was made before my family law parenting orders?

If you have an ADVO, any later **parenting orders** that are inconsistent with your ADVO will override those sections of your ADVO. If this happens the Family Courts must state in the parenting order that it is inconsistent with your ADVO, give a detailed explanation in the order about how the children's time with the other parent is to take place, explain the order to all people affected by the order, and serve a copy of the order on other parties and on the police and Local Court.

It may be helpful if you take a copy of your family law orders to your local police if you also have an ADVO in place and the parenting orders are inconsistent with the ADVO.

Where there is an inconsistency the ADVO will be invalid to the extent of the inconsistency. For example:

- The ADVO states the father is to stay away from the mother's home.
- The parenting order states the father is to collect their child from the mother's home on Friday at 4pm.
- The father will not be in breach of the ADVO on Fridays at 4pm but he will be in breach if he goes to the home at any other time.

What if my ADVO is made after my family law parenting orders?

If you need to apply for an ADVO and parenting orders are already in place, the Local Court has the power to vary the parenting orders to suit the conditions in your ADVO. The Local Court can only use this power if it has new material or fresh evidence that the Court that made the parenting order did not have when it made the order.

Unfortunately, Local Courts are reluctant to use this power to vary parenting orders. You should ask the police prosecutor or your lawyer to try to change the parenting orders if violence occurred at child changeover or involved the children. For example, if you hand the children over at your home or the violent person's home, you might ask to change the parenting orders so you can hand the children over at a public place.

If the Court makes a final ADVO it can vary, revive, discharge or suspend a parenting order. If the Court makes an interim ADVO it can vary, revive or suspend the parenting order but only for a maximum of **21 days**.

In family law proceedings, an ADVO naming the child or a member of the child's family is taken into account when the Court is deciding about the best interests of a child. This includes past and present ADVOS including interim ADVOS.

Can I get protection under the *Family Law Act*?

If you apply for parenting orders (whether you are married or in a **de facto relationship**) and your partner is violent, you can ask for an **injunction** under the *Family Law Act* to protect yourself and/or your children. An injunction is an order made by the Court to stop or restrain your partner from being violent towards you.

However, applying for an ADVO from the Local Court offers better protection. Breach of an ADVO is a crime and the police can make an immediate arrest.

Can I get counselling or other support after experiencing domestic violence?

The NSW government through **Victims Services** provides free counselling and may provide financial support and a recognition payment for people who have experienced physical or psychological injuries because of domestic violence which occurred in NSW.

Victims of domestic violence have up to **2 years to claim** for financial support and up to **10 years to claim** for a recognition payment. See Chapter 9: Referrals and Resources.